No. 15365

IN THE

United States
Court of Appeals
For the Ninth Circuit

SHELL OIL COMPANY, a Corporation,

Appellant,

vs.

LANUS WAYNE PRESTIDGE,

Appellee.

REPLY BRIEF OF APPELLANT

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Counsel for Appellant

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SUBJECT INDEX

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STATEMENT

In replying to the brief of Appellee, Appellant first wishes to correct a statement made in the opening brief of Appellant. On page six therein it was stated that in the first trial of the instant case the jury returned a verdict against Shell and Rocky Mountain of $53,934.53. The verdict in the instant case at the first trial was $19,905.85. The $53,934.53 verdict was returned in the companion case of Wuthrick vs. Shell Oil and Rocky Mountain. At the second trial of the Wuthrick case, the jury returned a verdict for the defendants.

Appellant also wishes to correct a statement made in the brief of Appellee filed herein. At page 33 it is claimed that work had started at the drilling site, on the morning of the accident, prior to the time the accident occurred. This is not correct. Drilling operations had not started at that time as shown in the testimony of Loren McIntyre appearing at page 199 of the Record:

> "Q. Was there any actual drilling at or on the morning of the first from the time you got out there up to and including the time this accident occurred?
>
> A. There was not."

This testimony was not denied and was supported by the testimony of Edmund W. Windolph, a witness for the Appellee, appearing at page 156 of the Record.

> "Q. You mentioned the fact that they had been broken down several times; it is true, isn't it, you were broken down at the time you related that the

accident happened and prior to when Mr. McIntyre arrived in town?

"A. Yes, I think it was a parted universal joint."

It will be recalled that the Record shows Loren McIntyre, the Shell geologist, was at the drilling site for the first time on the morning this accident occurred. Drilling had not yet started. The testimony further showed that no other Shell geologist or any other personnel of Shell had been at the job site prior to that time, so obviously the argument of Appellee that the Shell geologist had some control over the operations at the time the accident occurred is totally unrealistic.

The brief of Appellee does not clearly reveal the grounds upon which he claims the judgment in this case should be sustained. No analysis of the case is made but the argument of Appellee is based upon a statement of abstract principles of law. It is important to determine if those abstract principles of law apply to the facts of this case. The general statements made demonstrate the shifting positions taken by the Appellee.

ARGUMENT

APPELLEE POINTS I AND II

Appellee argues that Rocky Mountain and Shell were engaged in a joint adventure. The argument under this point first begs the question by assuming a joint adventure and then stating the rule of law making one joint adventurer liable for the negligence of another.

Under point II, Appellee, without considering or discussing the written contract between Rocky Mountain and Shell, claims several things were done which show a joint adventure. The first is the statement that Shell obtained the land to be drilled. It is difficult to see how this made Shell a joint adventurer with Rocky Mountain since Shell acquired the lease from Barhaug, the original Lessee, long before Rocky Mountain came into the picture. It will be recalled that Shell made the drilling contract originally with Wheeler and Gray, a partnership, and Rocky Mountain became a party to the contract by assignment from Wheeler and Gray. Appellee then points to the fact that certain leased ground was assigned to Rocky Mountain under the terms of the drilling contract, and that title and geological information was furnished Rocky Mountain. It would be strange indeed if the lessee did not convey such information to a driller. This was provided under the terms of the contract and if the contract made the parties joint adventurers the Court had the duty to so advise the jury.

The final argument of the Appellee to show that a joint adventure existed is that Shell "furnished the geologist for the drilling of the well." This is a misleading statement, the connotation of which is repudiated by the evidence of Appellee himself. The claim that the Shell geologist was in charge of the drilling was obviously an attempt to create a jury question. The proof disproved the argument. The geologist was at the job site for a period of only

about 30 days, some considerable time after the drilling had been started, and then only for the purpose of picking up core samples as the contract provided. If the contracting parties had operated at variance with the contract terms and if other acts of the contracting parties deviated from the contract terms, then a jury question might have been presented, but this was not done. In an endeavor to develop a fact question, the Appellee claimed that the Shell geologist was in charge of the drilling operation. Upon his representation to the trial court that newly discovered evidence would show control of the drilling operations by Shell, the Appellee obtained a new trial. Appellee represented to the trial court that two witnesses, Edmund Windolph, the drilling superintendent for Rocky Mountain, and Clarence Robinson, a foreman for Rocky Mountain, would prove that Loren McIntyre, the Shell geologist who came to the site to pick up samples as provided under the contract, had control of the drilling operations. Upon this representation the trial court granted a new trial. At the second trial Clarence Robinson was not even produced to testify and the Court is invited to examine the testimony of Edmund Windolph on this phase of the case. In response to leading questions such as:

> "Q. Did you rely upon Mr. McIntyre in the drilling of this well so far as the geology phase was concerned?,"

the witness obviously tried to support the Appellee. However, the testimony of any witness is only as

strong as his testimony on cross-examination. The direct testimony of Windolph, tempered by his cross-examination, resolved into his admitting that Mr. McIntyre, the Shell geologist, had no authority over the drilling (R. 156); that even the request of the geologist to take a core sample was refused by the foreman on the job (R. 152); that Rocky Mountain had drilled 960 feet before the Shell geologist came to the drilling site to collect samples (R. 157); and that Mr. McIntyre, the Shell geologist, had not even been on the job prior to the morning when the accident occurred. Thus, the testimony of witnesses for the Appellee conclusively demonstrated that nothing was done outside the terms of the drilling contract, and the court was obligated to determine the relationship as a matter of law and to so instruct the jury. It is significant that the brief of Appellee does not question this principle of law. It completely avoids it. There was absolutely no testimony of acts or conduct of the parties to the drilling contract contrary to, or at variance with the contract terms. This was completely considered and analyzed by Judge Clark when he concluded that the judgment in the first trial should be set aside.

The Appellee claims that additional witnesses were produced at the second trial. Apparently, this is an argument inferring that proof at the second trial showing variance with the contract was stronger than at the first trial. It is submitted that there was absolutely no additional proof in this respect which would have created a jury question.

Appellee argues that Shell and Rocky Mountain were engaged in a joint adventure. He carefully avoids stating whether it is claimed that a joint adventure is shown under the drilling contract or whether a joint adventure is shown by evidence of additional acts of the parties outside of, or at variance with the contract terms. An examination of the authorities listed under this argument reveals that the position of Appellee is not supported since all of the authorities deal with situations involving control outside and beyond contract terms. The following is a short abstract of the authorities cited by Appellee under this point. They will be discussed in the order in which they appear in the brief of Appellee.

30 Am. Jur. 680. This citation merely defines joint adventure.

Stearns vs. Williams, 72 Idaho 276, 240 Pac. 2d 833. The factual situation in that case is in no way similar or analagous to the instant case. There, a husband and wife joined in the purchase of property for the purpose of building and conducting a business thereon. The real question in the case was whether the contract was void as against public policy because the husband was engaged in Government work at the time the contract was made. The case was not decided on the question of joint adventure. However, the Court did state in the Stearns case that the intention of the parties to a contract control as to whether a joint adventure exists. In the instant case the parties to the contract considered it an independent contract and proceeded upon that basis.

Dunclick, Inc. vs. Utah-Idaho Pipe Company, 77 Idaho 499, 205 Pac. 2d 700. There is no similarity between this case and the instant case. In the Dunclick case plaintiff sold materials to defendants and claimed that they were engaged in a joint adventure. One defendant defaulted; the other defendant denied the relationship; there was no written contract between the defendants, but the question of relationship depended on evidence showing their method of doing business, the dealings of the parties and the particular transactions involved in the case. Finding of joint adventure was affirmed. A jury question was involved by reason of the factual questions which had to be resolved.

Shoemaker vs. Davis, (Kan.) 73 Pac. 2d 1043. This action was between the parties to a contract, one contending that a partnership relationship existed. The Court specifically found that the parties agreed to a joint adventure "Fully considered we think the agreement between the plaintiff and defendant implied such a sharing of profits and losses and was essentially a joint adventure." The contract in that case contemplated the joint operation and control of the project and sharing of profits.

Yeager vs. Graham (Kan.) 94 Pac. 2d 317. A quotation from this case at pages 320 and 321 will demonstrate the dissimilarity in the facts of that case and the instant case: "Without intending to make a complete statement thereof, the evidence here showed clearly that the appellant furnished the drilling rig and equipment necessary to be used in

developing the Davis lease under conditions heretofore mentioned; that its president sent one of its employees to attend to certain duties on the lease; that he arranged for other employees; that the appellant honored any draft on it for expenses of various kinds; that it advanced the amount of a bottom wheel order, even though the conditions thereof had not been met."

Gilbert vs. Fontaine, et al, 22 Fed. 2d 657. This case concerned a mining partnership. The court stated: "Mining partnerships are indulged between co-owners only when they actually engage in working the property. Before actual operations begin and after actual operations cease, they are simply co-tenants unless a partnership has been formed." The facts in that case are in no way similar to the instant case.

Eagle Star Insurance Company vs. Bean, 134 Fed. 2d 755. In that case an individual and a junk company engaged in dismantling a sawmill. The contract provided for reimbursement of the purchase price paid by one, then the parties were to divide the profits therefrom. The Court in that case held that the elements of a joint enterprise are:

1. Contract.
2. A common purpose.
3. Community of interest.
4. Equal right to a voice, accompanied by an equal right of control,

the Court saying "Equal right to control means each has equal right of management and conduct of the

undertaking and that each may equally govern upon the subject of *how, when and where the agreement shall be performed.*" *The Court further stated "As a corollary to the preceding requirement, it follows that each party must have an equal right of control over the agencies used.*" (Emphasis ours)

The factual situation and conclusions in this case in no way support the position of Appellee herein.

Schmidt vs. Nash, 217 Pac. 2d 830. This case did not even involve the question of whether a joint adventure existed, but involved an action for a debt on a written contract. In that case each party had an interest in the land and shared expenses. In the instant case Shell had assigned the lease on the land where the well was being drilled by Rocky Mountain and had no interest in the land at the time of drilling except its right to a royalty on the production if a well were brought in.

Sand Springs Home vs. Dail, (Okla.) 103 Pac. 2d 524, is not in point because the joint adventurers each owned an interest in the leasehold and shared in the expenses of operation. Other facts were totally dissimilar to the instant case.

Young vs. Reed, (Fla.) 192 So. 780. The statement made by the Court at page 784 describes a wholly different factual situation:

"Whatever else may be said on the subject it is obvious that the drilling of the two wells were simply efforts to develop the land for oil and gas in keeping with the obligation assumed by Kyle and Bail and passed on by them to the defendants conjointly with DeSoto. Thomas made a contribution to these ven-

tures by allowing the drilling rig and equipment moved into Bossier Parish. He and Dr. Reed made joint contributions toward the ventures by paying the expenses of the rigs removal and erection of the derricks. DeSoto's contribution consisted in the use of the unpaid for rig and his actively supervising the drilling as it progressed."

Grannell vs. Wakefield, (Kan.) 242 Pac. 2d 1075, was totally dissimilar in that there was no question about the partnership existing since both parties participated in the control and management of the enterprise.

Kirkpatrick vs. Baker, (Okla.) 276 Pac. 193, was brought by one of four lessees against the others. All parties admitted that a joint venture existed. The question was whether one had abandoned his interest, or could assert an interest after failing to pay his share of rentals.

Kasishke vs. Keppler, 158 Fed. 2d 113. In this case both parties actually participated in the work and had a joint ownership in the land. A similar situation existed in *Kasishke vs. Baker, 146 Fed. 2d 53*, where both parties contributed services and had a joint interest in the property involved.

Eagle Picture Lead Co. vs. Fullerton, 28 Fed. 2d 472. The question of whether a joint venture existed was not involved. The question involved was whether the parties to a joint venture by engaging in competition for new mineral leases from Indian owners abandoned a joint adventure contract relating thereto.

Bank of America vs. Fisher, 61 Fed. 2d 1060. In that case a receiver for a bankrupt corporation brought an action for interpretation of a contract between the company and defendant, under which defendant advanced the company $25,000.00 to drill oil wells, this amount to be repaid upon the first net production, and then the parties to share the profits therefrom. The contract itself provided that the parties were joint adventurers so there was no serious question about the relationship. The Court did point out a principle supporting the position of the Appellant herein by saying "If the transaction was evidenced by an instrument in writing the intention of the parties is to be determined primarily by a reference to the provisions thereof." In the instant case the contract determined the relationship of the parties, and both construed it to constitute an independent contract and at all times proceeded on that basis.

Ray vs. Cameron, (Mont.) 114 Pac. 2d 1060. In this case there is no question about the defendants being engaged in a joint venture. Both participated in the placer mining project. One contributed the money to purchase machinery under agreement that this money was to be first returned and then the parties to share the profits. However, the Court in that case pointed out to constitute a joint adventure there must be joint proprietorship and control and a sharing of profits and losses.

Wyoming-Indiana Oil and Gas Co. vs. Weston, 7 Pac. 2d 206. In this case the factual situation was entirely different. Parties had agreed to obtain and

develop certain leases, all profits to be shared. There was no serious question about the relationship created.

It is significant, we think, that none of the authorities cited by the Appellee holding a joint adventure involved facts in any substantial particular similar to the instant case. All of the cited cases showed joint control of the manner and means of carrying out the venture and a sharing of profits and losses. The contract involved in the instant case is one of independent contract and should have been so held by the trial court.

APPELLEE POINT III

The Appellee next contends that the question of whether a joint adventure existed between the Shell and Rocky Mountain Companies was a question of fact to be determined by the Jury. An examination of the authorities cited again demonstrates the fallacy and weakness of a statement of general law which does not apply to the factual situation involved in this case.

The following is a brief abstract of the authorities cited by the Appellee to support this argument in the order in which they appear.

48 C.J.S. 875. Appellee apparently refers to the statement in that paragraph to the effect "but whether a joint adventure existed has been held a question of fact." An examination of the authorities forming the basis for this statement demonstrates that this principle is applicable where the question of relationship is not confined to a written contract but involves evidence of proceedings and transactions of

the parties, completely outside of, in addition to or at variance with the provisions of the contract. This factor has apparently been ignored by the Appellee.

48 C.J.S. p. 876, this point is clearly stated: "Where the evidence as to the arrangement between joint adventurers is clear and undisputed, the legal effect of such arrangement is for the Court to determine."

Murry vs. Williams, 114 Fed. 2d 282. In this case there was no question about a joint adventure existing. The only questions involved were questions of fact concerning the transaction out of which the action for damages arose.

Stearns vs. Williams, 72 Idaho 276, 240 Pac. 2d 833 has heretofore been discussed. This was an action for specific performance and determined by the Court without a jury. Specific performance of a contract was denied as against public policy and is not authority for the position of the Appellee.

Russell vs. Boise Cold Storage, 43 Idaho 758, 254 Pac. 797. The question involved in this case was whether services of the plaintiff were rendered for one joint adventurer separately, or whether such services were rendered for both of the joint adventurers. The evidence was conflicting, and therefore it was a question of fact. The case is not helpful in considering the instant case.

Spier vs. Lang, (Cal.) 53 Pac. 2d 138. This case involved a question of partnership and is authority for the position of the Appellant and not of the Appellee. The court stated: "The foregoing conclusion and cited cases are in conformity with the definition of the partnership relationship contained

in the Civil Code, which includes as an essential element *the joint participation in the conduct of the business. The presence of the same element is necessary to constitute the parties joint adventurers.*" (Emphasis ours)

Kaufman vs. Superior Court, (Cal.) 210 Pac. 2d 88, involved a suit for prohibition to restrain the court from adjudging plaintiffs in contempt for refusing to comply with an order permitting inspection and copying of instruments. The Court merely held that the facts alleged in the complaint were sufficient to warrant the court issuing such order.

Hobart Lee Tie Co. vs. Grodsky, (Mo.) 46 S.W. 2d 859. In this case there was no written contract between the parties. The relationship depended on evidence submitted as to method of operations, financing of the business, sharing of profits and in whose names contracts had been made. Under these circumstances the Court pointed out that: "Other facts and circumstances tended to show no joint adventure." In this situation the question was for the jury.

Croft Bank vs. Gradsky, (Kan.) 232 Pac. 1076. This case also involved extensive evidence as to transactions between two parties. Demurrer to the evidence was reversed, the Court holding: "If an agreement that a Lessor is to receive a portion of the net profits as rent goes further and gives to the Lessor control of the business conducted in the leased premises, it is usually construed to constitute a joint adventure." This case is totally dissimilar from the instant one.

Glassman vs. Baron, 178 N.E. 628. The evidence

in this case was conflicting as to relationship existing between brothers-in-law and was therefore a fact question.

R. E. Davis Electric Co. Inc. vs. Hopkins, (Ore.) 64 Pac. 2d 1317. The Court in this case pointed out the rule that is urged by the Appellant: "There was also testimony tending to support the allegations of the complaint in respect to the joint adventure such as showing that Abbot on occasion bought supplies and assumed responsibility for payment of loggers' wages and exercised some control over the operation of the venture." Under such circumstances in view of such evidence of acts and control beyond the terms of the contract the Court held a jury question was presented.

Bennett vs. Sinclair Refining Co., (Ohio) 57 N.E. 2d 776, involved a tort action against joint defendants arising out of an automobile accident. The Court in this case held that where the ultimate facts are undisputed the question of relationship of the defendant is a question of law, and substantially supports the position of the Appellant in this case.

McDonald vs. Follett, (Tex.) 175 S.W. 2d 671, involved conflicting evidence, one party claiming that a partnership relationship existed and the other party claiming that the relationship had terminated with reference to leases which had expired prior thereto. The question involved in the case was not the relationship between the parties but the question of whether the relationship had terminated.

Cockburn vs. Irvin, (Tex.) 88 S.W. 2d 747, was totally dissimilar to the instant case. Defendant de-

nied the agreement with plaintiff. The conflict in evidence raised questions of fact.

San Francisco Iron and Metal Co. vs. American Milling and Industrial Co., (Cal.) 1 Pac. 2d 1008. This case in essence holds that matters leading up to and following a contract could be shown as well as: "Oral understandings had between the parties as to the plan of executing the joint adventure," being an entirely different case than presented herein.

This point III of the argument of Appellee avoids the real question involved in this case. It is based upon the presumption that in addition to the contract, the parties have acted contrary to or in variance with the contract provisions and that Shell exerted control outside the contract. There was no such evidence. This reasoning and logic is entirely unrealistic with respect to the instant case.

APPELLEE POINT IV

Under Point IV the Appellee argues that a joint adventure relationship may be established in favor of third persons by operation of law through the acts and conduct of the parties though they never intended such relationship.

This argument continues to disregard the real facts involved in this case. An examination of the authorities cited under this argument shows completely dissimilar situations. In each case where the above principle is supported, that case shows that representations were made to third parties upon which they relied. The instant case does not involve that situation. As pointed out in our opening brief, the Appellee did not rely upon the Shell Oil Company

as being a party involved in the drilling operations. The Appellee talked to the manager for Rocky Mountain concerning employment. He was attempting to obtain employment with Rocky Mountain, not with Shell. Appellee knew that the labor was being employed and paid by Rocky Mountain as shown by his testimony quoted in the opening brief of the Appellant. The Appellee knew that he was dealing exclusively with Rocky Mountain Company. He knew that Rocky Mountain—not Shell—was drilling the well. He even reported to his doctors that he was working for Rocky Mountain at the time the accident occurred. (R. 171) There was no representation by Shell and no business contact by or with Shell upon which the plaintiff relied or was misled. Thus the authorities cited by Appellee are not in point and have no bearing in this case. The authorities cited, however, support the arguments of Appellant.

Snavely vs. Walls (Cal.) 57 Pac. 2d 161. The Court there stated: "What had these third parties the right to believe from the language of the contract and the conduct of the parties, not as it affected the original makers, but as it affected the third parties."

Aiken Mills vs. U. S., 144 Fed. 2d 23. The question involved in this case was the recovery of processing taxes paid, and is no authority for the position of Appellee. The same observation can be made with respect to *Stearns vs. Williams, supra,* and *Dunclick, Inc., vs. Utah-Idaho Concrete Pipe Company.* In the Stearns case third parties were not involved. In the Dunclick case there were direct representations and negotiations between plaintiff and defendants and the question of estoppel was present.

In *Bennett vs. Sinclair, 57 N.E. 2d 783,* (citation should be *57 N.E. 2d 776)* the evidence proved conclusively that defendants were engaged in a joint adventure. The question of a joint adventure existing despite the contrary intention of the parties was not involved.

45 C.J.S. 813, supports the position of Appellant:

"A person by holding himself or by permitting another to hold such person out as a member of a joint adventure may estop himself to deny liability as a joint adventurer to a third person who has acted or changed his position in reliance on such conduct; but there is no liability on the theory of estoppel to one who has not relied or changed his position in reliance on any representation or act which was made or authorized by the person whom it is sought to charge."

This clearly states the basis for liability to third persons. Taking the evidence of the Appellee himself, there is no basis for imposing liability on Shell in the instant case since no representations were made, and nothing done by Shell to mislead or prejudice the Appellee.

APPELLEE POINT V

The Appellee likewise argues that Shell made Rocky Mountain its agent and operator. The instrument which Appellant is apparently referring to was a "Designation of Operator" which a Lessee, who is not doing the actual drilling itself, is required to file with the United States Land Office showing who is doing the actual drilling.

As Judge Clark clearly held, this did not make Rocky Mountain general agent for Shell. It was merely a compliance with the regulations of the Land Office. The filing of this instrument did not mislead Appellee. Appellee did not rely on it and had no knowledge of it. Under such circumstances it has no significance in this case, and the Court was in error in allowing its introduction into evidence.

APPELLEE POINTS VI AND VII

Points VI and VII argue that the question of agency and individual contractor relationship were questions for the jury in this case. Here again the Appellee does not make his position clear as to whether this contention is based entirely upon the written contract between Shell and Rocky Mountain or whether Appellee is claiming that there was evidence showing a variance from the contract or additional evidence of control beyond the terms of the contract. It is the position of Appellant plainly stated in its opening brief that the relationship of Shell and Rocky Mountain must be determined under the written drilling contract. The interrogatories which were submitted and every bit of evidence which the Appellee adduced in the trial merely showed that certain provisions of the written contract were carried out. There was no proof of variance from the contract terms. There was no dispute in the evidence; the facts were clear in showing that Shell had and exercised no control of the method or means of doing the drilling project. As Judge Clark so plainly stated, Shell, although interested in the results of the drilling, had nothing to do with the method, manner or means of doing the drilling.

There was no evidence of agency or joint adventure in this case and the Court should have ruled as a matter of law and dismissed the action as against Shell. The authorities cited by Appellee are not contrary to this holding.

CONCLUSION

This case presents a situation where Appellee has a final judgment against Rocky Mountain Oil Company for $19,905.85, yet, also seeks to collect the additional verdict returned in the second trial of this case. The effect of an independent contract is destroyed if the theory of the trial court is approved. Every such "farm-out" contract leading to oil and mineral development is, in effect, set aside. The Appellee has cited no case holding a similar drilling contract to be other than an independent contract. The parties meant it to be, and construed it to be such. Approving the method and theory employed by the trial court in this case approves an invasion of the power and duty of the court by the fact finding body. It is respectfully submitted that Judge Taylor should have followed the order of Judge Clark and when the Appellee completely failed to support the representations he made to obtain a new trial the Court should have dismissed this action against Appellant.

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